(16)

No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,

Petitioners,

v.

GEORGE WINDSOR, FT AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

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30 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Cases **Pages**

Rules

Statutes

TABLE OF AUTHORITIES – Continued

Publications **Pages**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The settlement of this putative class action, if it were ever approved by a final judgment, would have the potential to affect dramatically the interests of *amicus curiae* Owens-Illinois, Inc. ("Owens-Illinois"), because the settlement purports to strip non-settling defendants in the asbestos-related personal injury litigation, including Owens-Illinois, of their contribution and settlement credit rights.

Owens-Illinois, while never a party to the proceedings in this case, participated in the fairness hearing in the District Court and submitted an *amicus* brief to the Third Circuit opposing class cer-

tification and the settlement. Neither Petitioners nor Respondents have any incentive to brief for this Court the effect that the settlement, if approved, would have on the rights of the non-settling defendants and the future course of this litigation.

There are three important facts about this case:

1. Defendants in the asbestos litigation, including Petitioners, are jointly liable. Any settlement, therefore, has important ripple effects on the other defendants' liability.

2. This settlement is being misrepresented by the parties as a "solution" to the asbestos-related litigation. In fact, if this settlement were approved, it would remove virtually no future asbestos plaintiff from the tort system. It would merely remove Petitioners (and their assets) from the list of defendants sued by plaintiffs.

3. The asbestos litigation is unmanageable only to the extent that courts permit plaintiffs who are not sick — that is, who have no physical impairment as a result of asbestos exposure — to maintain lawsuits. (This issue is before this Court in *Metro-North Commuter RR Co. v. Buckley*, No. 96-320 (U.S.)). The class action here can be certified, and the settlement approved, only if such unimpaired plaintiffs are found to have standing to maintain lawsuits. Such a finding would make this litigation unmanageable.

The issue of this settlement's impact on the rights of non-settling defendants received almost no attention in either court below. Thus, if this Court rejects the Third Circuit's view of settlement class actions, this case should be remanded to the Court of Appeals for consideration of the crucial issues of fairness and efficiency.

Owens-Illinois participated actively as an *amicus* below. It believes that its views on these issues in this *amicus* brief may be helpful to the Court.

SUMMARY OF ARGUMENT

I(A). Perhaps the most striking feature of this case is that even if this Court answers Petitioners' "Question Presented" as they request — even if the Third Circuit was wrong to ignore the existence of the settlement in its class certification review — this purported class action would *still* fail the test of Rule 23(b)(3). As Petitioners themselves acknowledge, consideration of a settlement does not abolish the need for review of the proposed class action for predominance and superiority (which requires efficiency and fairness). (Pet. Brief 40). This settlement, which is not efficient and not fair, cannot properly be certified as a Rule 23(b)(3) class action. Moreover, since these issues were not fully reviewed below, a reversal by this Court should result in a return of this matter to the Third Circuit.

I(B)(1). This class action is not, by anyone's definition, "efficient" within the meaning of Rule 23(b)(3), and Petitioners are clearly wrong to tout it as a "unique opportunity to unburden the federal and state courts of the 'scourge' of asbestos litigation." (Pet. Brief 38). First, the class action does not encompass the more than 100,000 asbestos claims presently pending in the federal and state courts. It concerns only future claims (*i.e.*, those that were future claims at the time it was filed).

Moreover, ***this settlement would remove virtually no plaintiff from the tort system***, because it does not resolve finally, and as to all parties, even a single future claim. Rather, it is merely a device for removing a subset of defendants from all future asbestos cases. In many instances, it would do so despite the fact that the class action defendants will have paid zero dollars to "settle" the claims. This remarkable turn of events is possible only because the settlement purports (1) to shift the liability shares of the class action defendants to the non-settling defendants pursuant to the doctrine of joint and several liability; and (2) to impair the contribution and settlement credit rights of those non-settling defendants. The class plain-

tiffs will be enjoined from naming the class action defendants in their tort suits, but they surely will sue the other potentially responsible parties. Those parties will then be asked to pay Petitioners' share of liability.

I(B)(2). The inefficiency of this settlement is multiplied by the fact that it includes an agreement among the settling parties that "exposure only" plaintiffs — individuals who were exposed to asbestos but have suffered no clinically detectable injuries — have an injury-in-fact sufficient to satisfy Article III. The class action defendants, who for many years properly and successfully have asserted that "exposure only" plaintiffs have not suffered compensable tort injuries, now agree that those plaintiffs may invoke the jurisdiction of the federal courts to "settle" their non-existent claims. Why this change of heart? The price tag (to them) to "settle" those claims is *zero* dollars. A release of the class action defendants will be "deemed" to have been issued free of charge.

As the *Buckley* case currently before the Court demonstrates, inviting every individual who has mere exposure to a potentially hazardous substance into the federal courts is likely to have disastrous consequences for the fair and efficient administration of justice. Indeed, this case goes well beyond *Buckley*, for there the purported right to sue is limited to those with "massive, lengthy and tangible" exposure to asbestos. (*Buckley* J.A. 645). Here, the settling parties have agreed, and the District Court held, that every man, woman and child in the United States who had occupational exposure to asbestos, ***or merely lived in the household of someone who did***, has Article III standing. (*See* Pet. App. 95a-96a).

I(C). The settlement also is not "fair" within the meaning of Rule 23(b)(3), because of its unconscionable treatment of the rights of non-settling defendants. The blatant manipulation of contribution and settlement credit rights serves as the settlement's financial cornerstone, but it impermissibly leaves the non-settling defendants with inordinate liability shares. The main inequity springs from the

"deemed release," whereby the claims of future plaintiffs are "settled" for literally no money. As settled parties, the class action defendants will be largely immune from contribution claims by non-settling defendants. In many jurisdictions, however, the settlement credit to which the remaining defendants will be entitled will be limited to the amount of money paid in settlement — zero dollars. Thus, the liability of the class action defendants is shifted to the non-settling defendants, but the damages sought by the plaintiffs remain precisely the same.

II. Although this settlement is profoundly flawed, asbestos-related class action settlements can be crafted that safeguard the rights of the non-settling defendants. Indeed, Owens-Illinois agreed to act as class representative for the non-party defendants in the class action settlement recently approved by the Fifth Circuit, *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), and achieved just that goal. That class action settlement, which is currently making its way to this Court on *certiorari*, protects the rights of non-settling defendants.

ARGUMENT

I. THIS PURPORTED CLASS ACTION DOES NOT SATISFY THE REQUIREMENTS OF RULE 23(b)(3)

A. Even If the Settlement Is Taken Into Account, this Class Action Fails the Tests of Rule 23(b)(3)

Petitioners' central proposition in this case is that courts should be allowed to consider the existence of a settlement in determining whether class certification is appropriate under Rule 23. (Pet. Brief 18). Yet even Petitioners do not suggest that the Rule 23(b)(3) requirements of predominance and superiority be entirely abandoned: "[A] district court that takes settlement into account is still obligated to conduct the certification inquiry specified by Rule 23." (Pet. Brief 40). Indeed, Petitioners repeatedly maintain that their scheme envisions robust application of the Rule 23 requirements and would not "liberalize" the certification inquiry. (*See* Pet. Brief at 21 & 40).

Under Petitioners' own view then, this putative class action must meet the requirements of Rule 23(b)(3) — common questions must predominate and the class method must be superior to other methods for the *fair* and *efficient* adjudication of the controversy — ***when examined as a settlement***. This settlement is so profoundly inefficient and unfair, however, that it cannot possibly satisfy the Rule 23(b)(3) criteria.

The Rule 23(b)(3) issues of fairness and efficiency are crucial to the non-settling asbestos defendants (*see* Section I(B)-(C), *infra*), and Owens-Illinois made these objections in both courts below. In addition, Owens-Illinois noted as *amicus* below that the future claimants could not possibly have Article III standing. These issues were nevertheless not fully — or even partially — explored by the courts below. The focus of the Third Circuit's opinion was on the appropriate Rule 23 review of settlement classes, so the Court of Appeals had no occasion to consider the fairness and efficiency issues; the District Court merely brushed them aside with almost no comment.[1] The Third Circuit also did not fully explore the Article III issue, although Judge Wellford used his concurrence to state his view that the "exposure-only" plaintiffs lack standing to sue. (Pet. App. 60a-66a (Wellford, J., concurring)).

Since these crucial issues were erroneously decided by the District Court and have yet to be considered by an appellate court, this class action is simply not ripe for final certification. If this Court were to reverse the Third Circuit's holding on the role of a settlement

[1] The District Court devoted only three of its 300 findings of fact to these critical issues of fairness. (*See* Pet. App. 103a-223a). The court dismissed the principal objections from the third-party defendant *amici* with the finding, based solely on testimony from *Petitioners' Vice President*, that "the practical impact on the non-settling asbestos manufacturers or suppliers of the release and contribution and indemnity provisions of the [Settlement] Stipulation is likely to be small." (Pet. App. 154a (citing Rooney Testimony, March 1, 1994, at 3)). The court disregarded without mention the extensive evidence that Owens-Illinois submitted on this issue.

in the class certification process, Owens-Illinois submits that this case must return to the Third Circuit for a full examination of the efficiency of the class settlement, the fairness of the settlement to the parties, the absent class members and the non-settling defendants, and the serious Article III issues identified by Judge Wellford.

B. This Settlement Is Not a "Superior" Method of Adjudication Because It is Not Efficient

1. The settlement is not "efficient" because it will not reduce the number of asbestos cases in the tort system.

Petitioners assert that the settlement at issue here arose as a partial solution to "the nation's well-documented asbestos litigation crisis." (Pet. Brief 2). Petitioners' proposed "solution" to this alleged "crisis," however, is in fact no solution at all, because this settlement does not resolve *even a single case* as to all parties. Indeed, the settlement "solves" the asbestos problem only for the few defendants involved in the agreement, and it does so by shifting much of their liability to the non-settling defendants. (See *infra* pp. 16-21). Far from offering a systemic solution, this settlement removes virtually no plaintiffs from the tort system.

Asbestos-related personal injury claims do not arise from a single, discreet incident or exposure. Rather, they almost invariably are based upon exposure to products of a large number of companies over a prolonged period of time. Resolving the claims as to a single manufacturer, or a even a subset of defendants, does not resolve the entire claim.

The joinder of multiple defendants in asbestos litigation goes hand-in-glove with the doctrine of joint and several liability, which is still the law in most states. *See* Jean M. Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 Tex. L. Rev. 1701, 1750 (1995). Under joint liability, an asbestos defendant's exit from the tort system — through

settlement or bankruptcy — does not cause its liability simply to evaporate. Instead, unpaid portions of that liability get shifted to other defendants, who remain jointly liable for the entirety of the plaintiff's damages. (As Owens-Illinois explains *infra*, this settlement seeks to assign to the non-settling defendants the financial burden of Petitioners' unpaid liability, by attempting to strip the non-settling defendants of their contribution and settlement credits rights. (*See infra* pp. 16-20)).

Petitioners' citation to an earlier Third Circuit decision for the proposition that the use of settlement classes "has proven extremely valuable for disposing of . . . class actions" is inapposite. (Pet. Brief 38 n.18 (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) ("*GM Trucks*")). In making its point about efficiency, the *GM Trucks* court explicitly referred to "Agent Orange," the Dalkon Shield, breast implants, and antitrust litigation. *Id.* None of these involved the most serious complications of asbestos ligation, including the combination of jointly liable defendants who manufactured many different, widely distributed products.

The main flaw in Petitioners' approach to asbestos-related docket control is that they would "resolve" most of the future claims with fictitious "settlements" for "zero dollars." Such "settlements" would apply not only to exposure-only claims, but also to claims involving detectable asbestos-related conditions that do not meet certain medical criteria.

Under the Stipulation of Settlement, the potential claimants receiving zero dollar settlements will be "deemed" to have released Petitioners from their asbestos-related claims in the tort system. (*See* J.A. 91-92). The release must be "deemed" into existence because Petitioners will have neither paid nor unconditionally promised to pay money to the claimants, and the claimants will have neither signed nor agreed to sign an actual release of liability. *Id.*

Why would class counsel ever have agreed to "settle" a multitude of future claims for zero dollars? The answer is quite simple: While the settling parties are liable for zero dollars, the non-settling defendants are not. Although they may have "settled" their cases against Petitioners for zero dollars, these claimants therefore would simply omit Petitioners from the list of defendants on their complaints — they will be enjoined from doing otherwise — and proceed in tort against the non-settling asbestos defendants.

The artifice of the "deemed release" often will reduce not at all the total damages claims against the remaining defendants. (This scheme is discussed fully *infra* at pp. 16-18). In sum, the Stipulation of Settlement gives Petitioners free releases, and then balances the equation by shifting unpaid liabilities to non-parties to the settlement. Reinstatement of the settlement would not help clear court dockets of asbestos cases, because it would not remove the class plaintiffs from the tort system.[2]

2. The settlement is not "efficient" because it could significantly increase the number of plaintiffs seeking damages for exposure to asbestos.

Perhaps even worse, by purporting to give legal standing to people who suffer from no clinically detectable asbestos-related condition, this settlement threatens to expand the asbestos-related litigation

[2] This fact belies Petitioners' claim that "[u]nless the decision below is reversed, the federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners." (Pet. Brief 38). While it is true that Petitioners have for several years been protected from new filings by the District Court's injunction, no such protection was afforded the non-settling defendants. As a result, the new claims that accrued during that period were filed, predominantly in state courts, against the non-settling defendants. Dissolving the injunction may cause plaintiffs with pending claims to implead Petitioners in a significant number of those pending cases, but it does not follow that there will be a flood of new lawsuits in either the federal or state systems.

beyond the claims of people who are sick and summon into the arena the many people who have only occupational or secondary exposure to asbestos and who are not sick. This is not only grossly inefficient, it poses a significant risk to the increasing stability in the asbestos-related litigation dockets.

First, it is important to emphasize what is — and what is not — happening in asbestos-related personal injury litigation outside the context of this class action settlement. The number of claimants alleging present impairment from asbestos exposure is coming under control. Indeed, the claims of people with fatal or disabling asbestos-related diseases now represent a relatively small and shrinking proportion of pending claims nationwide. Thus, in the time since the Chief Justice appointed the Ad Hoc Committee on Asbestos Litigation, the lower courts have begun effectively to come to grips with what the Committee warned could be a "crisis" in docket control. *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 22, 26-27 (March 1991).

Among the most significant successes in this regard has been MDL 875, the federal multidistrict asbestos litigation. Judge Charles Weiner, who is overseeing MDL 875, has reported that more than 38,000 cases have been removed from the active federal asbestos docket during the pendency of the MDL. *In re Asbestos Prods. Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL 239863, *1 (E.D. Pa. May 2, 1996). That means that approximately 65% of all pending federal cases have been resolved as active matters as to all parties. These cases were not resolved by mass settlements of the type Petitioners propose. Rather, they were resolved through the active and often innovative efforts of Judge Weiner within the context of the pretrial consolidation.

Another striking fact about the asbestos litigation dockets is that they increasingly are dominated by the claims of people who are not sick. The "unimpaired" plaintiffs generally fall into two categories: (1) those who allege benign bodily changes that are detectable only by x-ray (usually these plaintiffs allege benign thickening of the pleural membrane lining the lungs); and (2) those who have no detectable bodily change at all and allege merely occupational or secondary exposure to asbestos (like most of the absent class in the present settlement).

Although up until now, most "nonimpairment" claimants have been of the first type (those with pleural thickening), plaintiffs are beginning to bring claims of the second type, based on exposure alone. Indeed, another case currently before this Court raises the question of whether such "exposure-only" plaintiffs have cognizable claims, or whether the asbestos-related personal injury litigation under the Federal Employer's Liability Act, 45 U.S.C. § 51, should be restricted to claimants who at least allege present impairment. *Metro-North Commuter RR Co. v. Buckley*, No. 96-320 (U.S.). Owens-Illinois has submitted an *amicus curiae* brief in the *Buckley* case, noting that the overwhelming weight of legal authority suggests that unimpaired claimants do not have a compensable tort injury. *See Buckley*, Brief of *Amicus Curiae* Owens-Illinois, Inc. In Support of Petitioner, at 13-20.

Experience in a growing number of jurisdictions has shown that the huge flood of nonimpairment claims (of both types) can be stemmed through a variety of means. *Id.* at 8 (citing cases). Some courts have dismissed these claims outright, while others have placed them on inactive dockets until such time (if ever) that an asbestos-related disease develops. *Id.* Judge Weiner disposed of more than 18,000 nonimpairment cases by "administratively" dismissing the claims, without prejudice and with all statutes of limitations tolled. *In re Asbestos Prods. Liab. Litig. (No. VI)*, at *4.

While many jurisdictions have begun to deal responsibly with the claims of the unimpaired, Petitioners' settlement would take the federal courts in precisely the opposite direction. This settlement maintains that unimpaired claimants not only have a compensable tort claim, they are actually in a position to *settle* their "claims"

for the sum of zero dollars.

Petitioners' assertion that unimpaired claimants have legal standing raises enormous implications for the federal courts, since the number of these claimants may be significant. As Owens-Illinois argued as an *amicus* below, mere exposure to asbestos does not give rise to an injury-in-fact required by Article III of the Constitution to support federal jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (injury-in-fact must be "distinct and palpable"). Although the Third Circuit's decision did not reach this issue, Judge Wellford identified this as a central flaw in Petitioners' claim. (Pet. App. 60a-66a) (Wellford, J., concurring). In responding to this obvious defect, Petitioners were put in the odd position of seeking to establish that the absent class suffered an injury-in-fact, in order to provide themselves the opportunity to prove, in the class action context, that unimpaired future claimants are *not*, in fact, injured (and therefore are adequately compensated by zero dollars from Petitioners).

Not even Petitioners believe that the federal courts should actively adjudicate the possible asbestos-related claims of every individual in the country who has occupational or secondary exposure to asbestos. Petitioners repeatedly have indicated that this class should not, indeed cannot, proceed as a litigation class. (*See* Pet. Brief 41-49). Petitioners thus believe the class has Article III standing only for the purpose of bringing a case that is "settled" the moment it is filed.

Neither the non-settling defendants nor the courts, however, will be able to avoid the ramifications of conferring Article III standing on, and thus inviting into the tort system, substantial numbers of individuals who previously have been held to lack the standing necessary to invoke federal jurisdiction. *See, e.g., Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). This class action should not become a vehicle for expanding dramatically the definition of a justiciable controversy.

Such a result would directly violate the efficiency prong of the Rule 23(b)(3) superiority inquiry. One court, in declining to "breathe the spirit of judicial combat into 8,500 persons [the absent class] who, so far, have shown no desire to litigate [the] matter," noted,

> [I]n deciding whether a class action is superior to individual actions, the Court must find that the number of individual actions will actually be reduced . . . The treatment of [these] claim[s] in a class action would not reduce the total amount of litigation. To the contrary, certification of [these] claim[s] as a class action would create a judicial nightmare which would be partially litigated in this forum and partially litigated throughout the state courts of this nation. Fed. R. Civ. P. 23, which is designed as an instrument of convenience, should not be abused to create such a burden on judicial resources.

Elster v. Alexander, 76 F.R.D. 440, 443 (N.D. Ga. 1977); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (noting that the "drum-beating" of a well publicized class action "may well attract excessive numbers of plaintiffs with weak to fanciful cases"), *cert. denied sub nom., Adams v. United States*, 484 U.S. 1004 (1988).

It is clear that this class is an enormously inefficient means of clearing asbestos dockets. Since, as Petitioners acknowledge, Rule 23 criteria must be applied "strictly" in the settlement class context (Pet. Brief 21), this Court should reject the proposed class action for failing to provide an efficient resolution of the class members' claims.

C. This Settlement Is Not a "Superior" Method of Adjudication Because It is Unfair To the Non-Settling Defendants.

1. To be "superior," a settlement must be fair.

Rule 23(b)(3) requires that a class action be superior to other available methods for the "*fair* . . . adjudication of the controversy." (Pet. Brief 2a) (emphasis added). Petitioners' proposed class action is so manifestly unfair that it utterly fails this prong of the Rule 23(b)(3) analysis.[3]

Owens-Illinois will leave it to others to make the case that this settlement would be unfair to the absent class.[4] Like the absent class members, Owens-Illinois and the other non-settling defendants were not party to the settlement negotiations, but they nevertheless had important rights at stake. When the negotiations ended, however, the non-settling defendants were faced with a settlement that *purposefully* trammels their right to credit for Petitioners' liability. This unfairness is enough to find that the settlement fails the superiority test of Rule 23(b)(3).

First, it is well-established that the fairness determination made by a court reviewing a class settlement should not be limited to the interests of the settling parties. Rather, the court must weigh the

[3] This is not to suggest that *all* class action settlements in the asbestos context are necessarily unfair to non-parties. On the contrary, as Owens-Illinois discusses in Section II *infra*, the Fifth Circuit recently approved a settlement that safeguards the rights of non-settling defendants. *In Re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996).

[4] Owens-Illinois would note, however, that the due process rights of an absent class that this Court identified in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), clearly is not confined to litigated class actions. Justice Ginsburg recently stressed the "centrality of the procedural due process protection of adequate representation in class action lawsuits, *emphatically including those resolved by settlement.*" *Matsushita Elec. Co. Ltd. v. Epstein*, 116 S. Ct. 873, 890 (1996) (Ginsburg, J., concurring) (emphasis added).

fairness of the settlement's impact on the rights of the non-settlers. *See* Manual for Complex Litigation 2d, § 23.14 at 166 (1985); *In re Masters, Mates & Pilots Pension Plan*, 957 F.2d 1020, 1026 (2d Cir. 1992) ("[W]here the rights of one who is not a party to the settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval."); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (due process requires the interest of absent persons be represented); *Katz v. Carte Blanch Corp.*, 496 F.2d 747, 757 (3d Cir.) (the superiority finding requires, among other things, consideration of the "fairness to all whose interests may be involved"), *cert. denied*, 419 U.S. 885 (1974).

Those courts' concern for the rights of non-settlers is founded on the array of contribution and settlement credit laws in the fifty states. While the state laws are by no means uniform, they consistently provide meaningful procedural and substantive protections against settlements that unfairly increase the liability of non-settlers to plaintiffs. A settlement that impairs the rights of non-settling parties to these substantive protections cannot pass the test of fundamental fairness. *See Masters, Mates & Pilots*, 957 F.2d at 1032 (finding that the district court erred in approving the settlement because it failed to "make a proper determination that the settlement would compensate [the non-settling party] fairly for his lost right to contribution"). The Second Circuit has found that the state law contribution and settlement credit rights of alleged joint tortfeasors create an interest that is so substantial that it requires independent representation in the course of comprehensive settlement negotiations. *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 739-40 (2d Cir. 1992).

2. In most states, the settlement's "deemed release" provision would result in zero-dollar settlement credits.

The present settlement not only impairs the rights of the non-settling parties to contribution and settlement credits, it goes through astonishing contortions to ensure that those rights will be impaired regardless of the nature of state law. Most egregiously, the character of that impairment shifts depending upon the nature of state law.

The Stipulation of Settlement defines the three principal alternative approaches to settlement credits used in the various jurisdictions:

> (1) ***Pro Tanto*** — A judgment against a non settling defendant is reduced by the amount of money paid by the settling party.
>
> (2) ***Per Capita*/Percentage Share Without a Contribution Bar** — A judgment against a non-settling defendant is reduced by the *per capita* or percentage share of the settling party's fault, and the non-settling defendant may bring an action for contribution against the settling party.
>
> (3) ***Per Capita*/Percentage Share With a Contribution Bar** — Same as Number 2, except that contribution actions are impermissible.

(J.A. 92-93).

In *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461 (1994), this Court conducted a detailed review of the three alternatives and held that the percentage share rule would apply in admiralty cases, since the *pro tanto* approach is "likely to lead to inequitable apportionments of liability." 511 U.S. at ____, 114 S. Ct. at 1468. As the Ninth Circuit recognized, the percentage share rule is the only set-off which satisfies "the statutory goal of punishing

each wrongdoer," the "equitable goal" of limiting liability to relative culpability, and the "policy goal of encouraging settlement." *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989), *cert. denied sub nom., Franklin v. Peat Marwick Main & Co.*, 498 U.S. 890 (1990). Despite the manifest unfairness of the *pro tanto* approach, however, it remains the law in "a substantial majority of jurisdictions." Eggen, *supra*, 73 Tex. L. Rev. at 1709-1710 and n.38 (citing authority); *cf.* Stipulation of Settlement at XII (A)(2) (J.A. 92) (claiming 21 jurisdictions follow the *pro tanto* approach).

The ordinary unfairness of the *pro tanto* rule identified in *McDermott* pales, however, in comparison to the inequity resulting from a combination of the *pro tanto* rule and the "deemed" zero-dollar releases in this settlement. Owens-Illinois actively participated in the District Court's fairness hearing in this case, and the testimony it elicited proved that the "deemed releases" would often produce zero-dollar "settlements." Moreover, under cross-examination by Owens-Illinois' counsel Robert Riley, Michael Rooney, an executive for Petitioners, and Robert Hatten, a lawyer for the plaintiffs, both were unable to deny that the "deemed releases" in *pro tanto* jurisdictions will generate zero-dollar settlement credits:

Testimony of Michael Rooney (Petitioners' Vice President for Claims):

> **Mr. Riley (Counsel for Owens-Illinois):** Well let's assume you do claim you're settled and that the deemed release bars the contribution claim, alright? If it's barred, then the action's going to go forward against the other defendants, right?
>
> **Mr. Rooney:** Under your hypothetical, that would seem to be what would happen, yes.
>
> **Mr. Riley:** Alright. And the amount of money you, as a quote, "settled defendant" will have paid the defendant is zero dollars, right?

> **Mr. Rooney:** . . . [W]e would not have paid any money at that point in time, that's correct.
>
> **Mr. Riley:** And under my hypothetical, in Illinois, a *pro tanto* jurisdiction, the amount of the settlement credit is the amount of money paid?
>
> **Mr. Rooney:** My understanding is if and when a co-defendant takes a verdict, that would be correct.

Rooney Testimony, March 9, 1994, at 234-35.

Testimony of Robert Hatten (Plaintiffs' Class Counsel):

> **Mr. Riley (Counsel for Owens-Illinois):** [In a *pro tanto* state] assume [Petitioners] paid zero dollars and the plaintiff has sued other companies. So assume you're a lawyer representing the plaintiff. Isn't it true your position would be that the settlement credit available to the non-settling parties by virtue of [Petitioners'] class action settlement would be zero dollars?
>
> **Mr. Hatten:** Yes.

Hatten Testimony, March 8, 1994, at 211.

If the non-settling defendant is entitled to credit only for the amount actually paid by the settling defendant (*pro tanto*), and the release is for zero dollars, the non-settling defendants would be forced to assume *all* of Petitioners' share of liability. When this Court identified the "large potential for unfairness" under the *pro tanto* approach, *McDermott*, 511 U.S. at ____, 114 S. Ct. at 1469, it had not had occasion even to contemplate such a brazen exploitation of the *pro tanto* rule.

3. When combined with a contribution bar, the "deemed release" and the *pro tanto* rule are particularly unfair.

In most jurisdictions, the non-settling party is barred from bringing a claim for contribution against a settling defendant. Eggen, *supra*, 73 Tex. L. Rev. at 1708-09 n.30; *see also* Stipulation of Settlement at XII (A)(3) (J.A. 92) (claiming 12 jurisdictions allow contribution claims by non-settling defendants). This is unsurprising, since, as this Court has noted, a contribution claim "burdens the courts with additional litigation." *McDermott*, 511 U.S. at ____, 114 S. Ct. at 1467.

In the absence of the right to a contribution action, settlement credits are even more important: "[I]f the right to contribution is extinguished by a bar order, the credit offset must adequately compensate the nonsettling defendant for the barring of its contribution claim." *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1572 (D.S.C. 1991); *see also Jiffy Lube*, 927 F.2d at 160 ("If the non-settling defendant loses his right to contribution, [the court must] ensure that the non-settling defendant pays no more than his share of any future judgment that may be entered against him in favor of plaintiffs."); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1238 (S.D Tex. 1992) ("The terms under which the bar orders are imposed must be fundamentally fair and equitable to the non-settling defendants.").

Where the right of contribution is barred and the settlement offset is *pro tanto*, unfairness is particularly likely. As Justice White has noted, "The critical point both in *McDermott* and the instant case is that the provision of a *pro tanto* credit alone without any additional right to contribution (however the negation of that right is achieved) is inimical to the nonsettlors' rights." *TBG, Inc. v. Bendis*, 36 F.3d 916, 931 n.3. (10th Cir. 1994) (White, Associate Justice (Ret.), concurring). The artifice of the "deemed release" means non-settling defendants face a *pro tanto* set-off of zero *and* no right to contribution in many — if not most — future cases.

4. In other states, the "deemed release" would disappear.

Another illustration of the manipulative nature of the settlement is the fact that the "deemed release" does not apply in all jurisdictions. (*See* J.A. 94-95) (no deemed release for Settlement Class Members in Per Capita or Percentage Share Jurisdictions with Contribution Bars). As noted above, whether a release is to be "deemed" into existence turns on the manner in which state law quantifies settlement credits. Not surprisingly, where the method favors the non-settling defendants, there are no "deemed releases" under the Stipulation.

For example, granting Petitioners the status of settled defendants in New York would entitle the non-settling defendants in every future case to a settlement credit equal to the greater of the amount actually paid in settlement (*pro tanto*) or the percentage of liability assigned to the settling defendants at trial. *See* Eggen, *supra*, 73 Tex. L. Rev. at 1713 (describing New York's two-tiered approach). A "deemed release" for zero dollars in New York thus would still provide the non-settling defendants with a settlement credit equal to Petitioners' shares of liability. Rather than be consistent in its terms, the settlement is consistent merely in its purpose — as it is designed to facilitate, not prevent, the unfair shifting of liability to the non-settling defendants, there is no "deemed release" concerning future New York claimants.

5. The settlement is replete with other provisions unfair to the non-settling defendants.

Moreover, the "deemed release" is augmented by an array of additional provisions with the purpose and effect of frustrating attempts to enforce settlement credit and contribution rights under state law. For example, claimants who "settle" for zero dollars may never sue Petitioners in the tort system, but they are free to sue the non-settling defendants (J.A. 87); successful efforts to

bring cross-claims against Petitioners will be met with joint (defendant/plaintiff) motions to sever (J.A. 95) (meaning that the cross-claims are, as a practical matter, unlikely ever to be heard in court); and those qualifying claimants permitted to sue Petitioners will be delayed by the Settlement Stipulations "case flow" restrictions on such claims — but only as to their claims against Petitioners, not the non-settling defendants (J.A. 87).

Among the most remarkably unfair aspects of the settlement is the provision stating that the claimants' factual submissions to Petitioners are to be kept secret from the non-settling defendants. (J.A. 53-54). This means that the settlement prohibits disclosure to the non-settling defendants of any proof of a claimant's exposure to Petitioners' products. Thus, in those jurisdictions where a *per capita* settlement credit is recoverable, the non-settling defendants may be unable to produce the necessary proof of the claimant's exposure to obtain their rightful verdict off-sets.

In sum, the Settlement Stipulation is unfair to the non-settling defendants on its face. If the Settlement Stipulation were fair, it would not be necessary to extinguish the contribution and settlement credit rights of the non-settling defendants through the artifice of zero dollar "deemed releases" that appear and disappear as one moves from jurisdiction to jurisdiction and claimant to claimant. If the Settlement Stipulation were fair, secrecy agreements, joint motions to sever and restrictions on trial proof would have no place in the settlement.

These carefully crafted provisions are in the Settlement Stipulation because Petitioners intend to pay only part of the cost of resolving at a single stroke their potential liability share of future asbestos-related claims. They intend that the rest of the bill be paid by the non-settling defendants. This palpable inequity — the shifting from Petitioners' to the non-settling defendants the true cost of Petitioners' plan to exit the asbestos litigation tort system — means that the settlement fails the fairness prong of the Rule 23(b)(3) superiority requirement.

II. THE SETTLEMENT HERE IS IN CONTRAST TO THE FIBREBOARD SETTLEMENT RECENTLY APPROVED BY THE FIFTH CIRCUIT

The Fifth Circuit recently approved an asbestos-related class action settlement that, in contrast to this one, protected the rights of non-settling defendants. *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996). That case involves a limited fund class action brought under Rule 23(b)(1)(B) by a class of future asbestos-exposed claimants against Fibreboard Corporation. Fibreboard's "Global Settlement Agreement" with the plaintiffs establishes a trust funded with $1.535 billion, representing the proceeds of a settlement that Fibreboard reached with two insurers. *Id.* at 972. Underlying the Global Settlement was the risk that, if Fibreboard lost a pending insurance coverage dispute, there would be virtually no monies available to pay asbestos claims against Fibreboard (either by the plaintiffs or by the non-settling defendants). *Id.* at 976.

Under the Fibreboard Global Settlement Agreement, a claimant must first seek to settle with the trust after providing information for evaluation of his or her claim. If no settlement is reached, the claimant may proceed through mediation, non-binding arbitration and then, finally, the tort system (where recovery is limited to $500,000, with no punitive damages). *Id.* at 973. In addition to the Global Settlement Agreement, Fibreboard settled with all of its co-defendants in a Third-Party Settlement Agreement and reached a "Trilateral Settlement Agreement" with its two insurers, discharging them of all policy obligations in exchange for $2 billion ($1.535 billion for the settlement of future cases and almost $500 million for pending cases, which are not related to the Global Settlement). *Id.*

There are many significant differences between the Fibreboard settlements and Petitioners' proposed class action. For example, Fibreboard's is a limited fund class action brought under Rule 23(b)(1)(B). *Id.* at 982. Moreover, the Fibreboard settlement is brought in equity, and it provides only a pool of money and a

distribution process to pay claimants. "Determinations of individual awards will be made by the trust and the plaintiff's attorney in settlement negotiations or in a full trial on the merits." *Id.* at 976 n. 7. The Fifth Circuit found this to stand in "stark contrast" to the present settlement, which awards damages to individual claimants based solely on the severity of their injuries. *Id.* at n.8.

Most importantly to Owens-Illinois, the Global Settlement Agreement provides that good-faith settlement payments by Fibreboard generally will result in settlement credits or verdict off-sets that eliminate or substantially reduce the liability of non-settling defendants for Fibreboard's share under joint and several liability. *Id.* at 973. Furthermore, "any third-party co-defendant who suffers a judgment before the trust settles with the plaintiff and pays a Fibreboard share, succeeds to the plaintiff's rights against the trust." *Id.* The fairness to the non-settling defendants of the Global Settlement Agreement stands in sharp contrast to the manipulative settlement credit and contribution machinations of Petitioners' proposal.

CONCLUSION

The judgment below should be affirmed, or the case should be remanded to the Third Circuit for further inquiry into the fairness and efficiency of the proposed settlement and the issues relating to Article III standing.

Respectfully submitted,

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